REPLY BRIEF FOR PLAINTIFFS-APPELLANTS
RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.
and ALLIANCE OF ARTISTS AND RECORDING COMPANIES

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.
and ALLIANCE OF ARTISTS AND RECORDING COMPANIES,

Plaintiffs-Appellants,

v.

DIAMOND MULTIMEDIA SYSTEMS, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Central District of California
in CV 98-8247 ABC (RZx), Judge Audrey B. Collins

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Dated: January 8, 1999

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INTRODUCTION

As demonstrated in our main brief, the Rio product manufactured and sold by defendant-appellee Diamond Multimedia Systems, Inc. ("Diamond") is designed and marketed for the primary purpose of making unauthorized second (or higher) generation digital copies of copyrighted CD music. As such, the Rio product is exactly the type of device that the AHRA was designed to preclude – a device that enables users who may never have even seen, let alone purchased, a commercial CD to record a second or higher generation digital copy of the CD's music.

Diamond can advance no substantive defense for what it is doing, and instead concocts a litany of supposed loopholes and constitutional infirmities in the AHRA designed to prevent the statute from fulfilling its purpose. As demonstrated below, however, none of Diamond's technicalities has support in the law, and its continuing violation of the AHRA should be stopped.

While Diamond is the appellee here, it nonetheless spends most of its brief attacking the district court's key conclusions – that the Rio device is a digital audio recording device subject to the AHRA; that the Rio device makes second or higher generation copies of digital musical recordings; and that the Rio device has not complied with Section 1002 (a) of the AHRA.

Diamond also resurrects its attack upon the constitutionality of the AHRA, an attack that was summarily rejected by the district court. To the extent that the district court's decision should be reviewed under an abuse of discretion standard, it is the plaintiffs-appellants who receive the benefit of that standard on these points. But whatever standard is applied, the district court was correct on all of these points, establishing that Diamond is in continuing violation of the AHRA.

While the district court's denial of a preliminary injunction was based on its prediction that the Secretary of Commerce will certify the Rio device under Section 1002 (a) (3) of the AHRA as having a system that prohibits unauthorized serial copying, Diamond has apparently recognized the difficulties it would face in obtaining such certification. Accordingly, Diamond now relies on Section 1002 (a) (2), arguing that its Rio product "does everything Section 1002 (a) (2) requires of it." Diamond Br. 41. The district court found to the contrary – that the Rio device "does not fall under section (a) (2)." ER 106. Because, as Diamond concedes, the Rio device does not receive and act upon copyright and generation status information sent by SCMS-compliant devices – an affirmative requirement of Section

1002 (a) (2) – the Court should reject Diamond's claim of Section 1002 (a) (2) conformance as a matter of law.

As the district court found, the Rio product can be used only through serial copying, ER 104, and will inevitably be used to record illegitimate music, ER 107. If Diamond could nevertheless persuade the Secretary of Commerce to certify that the Rio device contains a system "prohibiting unauthorized serial copying," then Diamond would have complied with the serial copying control provisions of the AHRA. But Diamond (for obvious reasons) has not even attempted to seek such certification, and the district court erred in denying the preliminary injunction sought.

ARGUMENT

I. Diamond's Rio Device Is a Digital Audio Recording Device Subject to the Audio Home Recording Act

Diamond's principal argument on appeal is that its Rio device is not a "digital audio recording device" subject to the AHRA. The district court rejected this argument below. ER 106. The district court's thoughtful analysis on this point is consistent with both the plain language of the statute and its legislative history, and with the policies that the AHRA was designed to further.

A. The Rio Device Makes Digital Audio Copied Recordings of Copyrighted Commercial CDs

The AHRA imposes requirements on manufacturers of "digital audio recording devices." 17 U.S.C. §§ 1002, 1003. A "digital audio recording device" is defined as:

> any machine or device of the type commonly distributed to individuals for use by individuals, whether or not included with or as part of some other machine or device, the digital recording function of which is designed or marketed for the primary purpose of, and that is capable of, making a digital audio copied recording for private use . . . .

17 U.S.C. § 1001 (3). A "digital audio copied recording" is defined as "a reproduction in a digital recording format of a digital musical recording, whether that reproduction is made directly from another digital musical recording or indirectly from a transmission." 17 U.S.C. § 1001 (1).[1]

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[1] Diamond did not dispute that an MP3 file stored in the memory of a Rio device is a reproduction. A copy in computer memory is a reproduction for copyright purposes. *MAI Systems Corp.* v. *Peak Computer, Inc.*, 991 F.2d 511, 518-19 (9th Cir. 1993) (loading computer program into random access memory is making a copy); *Triad Sys. Corp.* v. *Southeastern Express Co.*, 64 F.3d 1330, 1335 (9th Cir. 1995) (finding it "clear" that loading a program into RAM is copying). Neither did Diamond dispute that MP3 is a digital recording format.

Digital musical recordings are the things that the AHRA protects. The AHRA defines "digital musical recording" as follows:

> A "digital musical recording" is a material object--
> (i) in which are fixed, in a digital recording format, only sounds, and material, statements, or instructions incidental to those fixed sounds, if any, and
> (ii) from which the sounds and material can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

17 U.S.C. § 1001 (5) (A). As the district court recognized, "a conventional audio CD is a 'digital musical recording.'" ER 104. Indeed, an audio CD is the archetype of a digital musical recording – a material object in which music is fixed and from which it can be reproduced.

The Rio device has a recording function that is designed and marketed for the primary purpose of making digital reproductions – in MP3 format – of digital musical recordings – audio CDs. Diamond argues, however, that the Rio device does not make digital audio copied recordings as defined by the AHRA because the *immediate source* of a reproduction in the Rio memory is a file on a computer hard drive, not a CD.

But the statutory definition of digital audio copied recording says *nothing* about the immediate source of the reproduction; to the contrary, the definition expressly includes reproductions whether made directly from a

CD or "indirectly from a transmission." 17 U.S.C. § 1001 (1). Diamond's "immediate source" argument would read this quoted language out of the statute, and create a new definition of a digital audio copied recording as a copy made directly and immediately from a digital musical recording. As the district court correctly found, Diamond's argument is fallacious. ER 97-102.

When a consumer uses the Rio product as intended by Diamond, he or she first uses the MusicMatch ripping software included as part of the Rio product to rip tracks from a CD and make a first generation copy on a computer's hard drive. The consumer then uses Diamond's Rio Manager software to make a second generation copy of the first generation copy in the memory of the Rio device. Both of these copies are "reproduction[s] in a digital format" of a digital musical recording – the CD. Whether the first generation copy on the hard drive is itself a "digital musical recording" is irrelevant: What matters is that the second generation copy inside the Rio device is a reproduction of the CD.

Similarly, when a track is ripped off a CD, posted to a pirate MP3 Internet site, downloaded to a computer hard drive and copied to the Rio device, the serial copy made in the Rio device is still a reproduction of the

CD. That reproduction is not made directly from the CD; it is made through intermediate transmissions. But the AHRA makes clear that a copy made "indirectly from a transmission" is still a digital audio copied recording of the original CD. 17 U.S.C. § 1001 (1).

This analysis is confirmed by the AHRA's definition of "serial copying," 17 U.S.C. § 1001 (11), which does not require that the intermediate copies be themselves "digital musical recordings." "Serial copying" is defined as "the duplication in a digital format of a copyrighted musical work or sound recording from a digital reproduction of a digital musical recording." *Id.* This definition identifies three recordings: (1) the original "digital musical recording," (2) the first-generation copy, a "digital reproduction of a digital musical recording," and (3) the second-generation copy, a "the duplication in a digital format . . . from a digital reproduction . . . ." The first and second generation copies are not defined as "digital musical recordings"; instead, they are defined with the broader terms "digital reproduction" and "duplication in a digital format."[2]

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[2] Apparently unhappy with the statutory definition of serial copying, Diamond makes up its own: Serial copying assertedly means only a chain of

[Footnote is continued on following page]

Moreover, as the district court noted, the AHRA's serial copying definition does not require that each intermediate copy be made by a digital audio recording device. *See* ER 104. Because the nature of the intermediate copies and the way they are made is irrelevant to the definition of the activity that the AHRA regulates – unauthorized serial copying – it is also irrelevant to the definition of the regulated devices.

This analysis is consistent with the use of the term "reproduction" elsewhere in copyright law. *See, e.g., Davis* v. *E.I. duPont de Nemours & Co.*, 240 F. Supp. 612 (S.D.N.Y. 1965) (television script is infringing reproduction of Broadway play even though play was copied indirectly via an intermediate screenplay); *see also* 2 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 8.01[c], at 8-18 (1994) (infringement from "indirect copying").

[Footnote continued from previous page]

reproductions which all contain SCMS codes. Diamond Br. 61. According to Diamond's definition, if one strips out the SCMS codes – as its MusicMatch software does – then there is legal non-serial copying. This nonsense is, of course, inconsistent with the AHRA, which forbids such circumvention. 17 U.S.C. § 1002 (c).

Because the copy in the Rio memory is a reproduction of a CD, it is a reproduction of a "digital musical recording," regardless of the number or nature of intermediate transmissions. Thus, the Rio makes "digital audio copied recordings" as defined in Section 1001 (3).

B. The Rio Device Is Not Exempted from the AHRA by Section 1001 (5) (B) (ii)

As noted above, it does not matter under the AHRA whether the immediate source of a digital audio copied recording is itself a digital musical recording. Accordingly, Diamond's lengthy argument that the hard drive of a computer is not itself a digital musical recording is irrelevant. What matters is that the Rio device makes digital reproductions of copyrighted commercial CD tracks, albeit through a serial copying process that includes intermediate transmissions.

Diamond's argument is that its Rio device is beyond the reach of the AHRA because of the statutory exclusion of spoken word recordings and multimedia computer programs from the definition of "digital musical recording":

> (B) A "digital musical recording" does not include a material object--
> (i) in which the fixed sounds consist entirely of spoken word recordings, or

> (ii) in which one or more computer programs are fixed, except that a digital musical recording may contain statements or instructions constituting the fixed sounds and incidental material, and statements or instructions to be used directly or indirectly in order to bring about the perception, reproduction, or communication of the fixed sounds and incidental material.

17 U.S.C. § 1001 (5) (B).[3] Diamond appears to feel that this section creates a complete exemption from AHRA requirements for any device that interacts with a computer's hard drive.[4]

That argument is inconsistent with the AHRA's language and legislative history, and would effectively negate the statute. The district court correctly rejected this sweeping argument:

> More importantly, Defendant's construction of Section (5) (B) (ii) would effectively eviscerate the

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[3] As the district court noted, the latter exclusion was intended "to avoid immunizing the illegitimate copying of computer programs from liability for copyright infringement." ER 101-02. Section 1008 of the AHRA provides immunity for certain copying activity, and Congress did not intend to extend that immunity to unauthorized copying of CD-ROMs.

[4] As Diamond observes, general purpose computers and hard drives, and other general purpose devices, are not subject to the AHRA. However, this results not from Section 1001 (5) (B) (ii), but from the definition of "digital audio recording device" in Section 1001 (3), because the making of digital copies of recorded music is not the primary purpose of general purpose computers or hard drives. *See* ER 100.

> AHRA. Any recording device could evade AHRA regulation simply by passing the music through a computer and ensuring that the MP3 file resided momentarily on the hard drive. ... [T]he Court is skeptical that Congress intended Defendant's counter-intuitive construction of Section (5) (B) (ii).

ER 102.

II. Diamond Has Not Complied With Any of the Systems for Preventing Unauthorized Serial Copying Required by the AHRA

The AHRA requires that a manufacturer of digital audio recording devices comply with one of three means for controlling serial copying. 17 U.S.C. § 1002 (a); ER 104-05. Specifically, Section 1002 (a) provides, in pertinent part, that:

> No person shall import, manufacture, or distribute any digital audio recording device ... that does not conform to:
> (1) the Serial Copy Management System;
> (2) a system that has the same functional characteristics as the Serial Copy Management System and requires that copyright and generation status information be accurately sent, received and acted upon between devices using the system's method of serial copying regulation and devices using the Serial Copying Management System; or
> (3) any other system certified by the Secretary of Commerce as prohibiting unauthorized serial copying.

17 U.S.C. § 1002 (a).[5]

As demonstrated in our main brief, the district court erred in denying the preliminary injunction based on its belief that the Secretary of Commerce would certify Diamond's Rio device under Section 1002 (a) (3). Diamond says little in its appeal brief to support the district court's reasoning, apparently having now decided that it does not intend to seek such certification. Instead, Diamond now urges that it has modified the software included as part of its Rio product to comply with Section 1002 (a) (2).[6] But no evidence of this claimed modification is contained in the record

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[5] Both Diamond (Diamond Br. 10, 58) and CEMA (CEMA Br. 15-16, 21, 26) contend that the AHRA authorizes or legalizes certain copying, but that is not so. Nothing in the AHRA purports to authorize any activity that would otherwise be a copyright infringement. The AHRA does, however, provide limited immunity from infringement suits to consumers and to manufacturers of certain audio recording devices. 17 U.S.C. § 1008.

[6] Self-styled amicus Consumer Electronics Manufacturers Association ("CEMA") claims that Diamond also complies with Section 1002 (a) (1). Plaintiffs have opposed CEMA's motion for leave to file a brief as *amicus curiae* on the grounds that its proposed brief addresses issues such as that which are not properly before the Court and otherwise merely repeats arguments made by Diamond. Because the Court's decision on CEMA's motion remains pending, we address herein the arguments made by CEMA as appropriate.

on appeal, and, accordingly, there is no basis upon which this Court could conclude that the claimed modification in fact complies with the AHRA. The district court's decision denying a preliminary injunction was in error, and that decision should be reversed; whether Diamond has brought itself into compliance with the AHRA on some new basis is something Diamond could raise in subsequent proceedings below.

In any event, Diamond's Rio product – with or without modified software – does not meet the requirements of any part of Section 1002 (a). Diamond does not comply with Section 1002 (a) (1) because the Rio device does not have the technical characteristics of SCMS. Even if Diamond's modified Rio software were considered a system that has the *functional* characteristics of SCMS, Diamond would still not comply with Section 1002 (a) (2) as a matter of law, because the Rio device does not accurately receive and act upon copyright and generation status information sent by SCMS-compliant devices. And Diamond does not comply with Section 1002 (a) (3) because it has not implemented any system certified by the Secretary of Commerce as prohibiting unauthorized serial copying.

A. Diamond Does Not Comply With Section 1002 (a) (1) Because the Rio Device Does Not Have the Technical Characteristics of SCMS

Section 1002 (a) (1) requires that a device conform to "the Serial Copy Management System." To do so, a device must conform to both the functional and the technical characteristics of SCMS set forth in the Technical Reference Document ("TRD") developed along with the AHRA. The legislative history of the AHRA states that SCMS "is to be construed as meaning only the *functional **and** technical characteristics* as set forth in the [TRD], as reproduced in the report of the Energy and Commerce Committee, [H.R. Rep. No. 102-780, at 32-50]." H.R. Rep. 102-873, pt. 1, at 14 (1992) (emphasis supplied).[7] Accordingly, unlike Section 1002 (a) (2), Section 1002 (a) (1) requires conformance to the *technical* characteristics of the SCMS system in the TRD, not merely the functional characteristics.

[7] The word "only" in this passage relates to an earlier part of the Report which says "the [TRD] describes the functional and technical characteristics of that system, *while also containing narrative discussion of other issues, such as copying of analog source material, that raise important policy questions*." H.R. Rep. 102-873, pt. 1, at 14 (1992) (emphasis supplied). The word "only" indicates that any material in the TRD other than the functional and technical characteristics of the system is not part of SCMS.

The structure of the TRD distinguishes the functional and technical characteristics of SCMS:

TRD Section	**Contents**
I.A	Functional Characteristics of SCMS for digital audio interface formats
I.B, I.C	Technical Characteristics of SCMS in the IEC 958 interface format
II.A	Functional Characteristics of SCMS for digital audio recording devices
II.B, II.C	Technical Characteristics of SCMS in Digital Audio Tape ("DAT") recorders
III	Application of SCMS in DAT recorders implementing IEC 958 format

The "functional characteristics" in Sections I.A and II.A comprise general requirements for digital audio interface formats and digital audio recording devices. *See, e.g.*, TRD § II.A, *reproduced in* H.R. Rep. No. 102-780, pt. 1, at 42 (1992) ("To implement the *functional characteristics* of SCMS in DAR devices . . ."). Sections I.B, I.C, II.B and II.C, on the other hand, contain the "technical characteristics" for implementing SCMS in specific interfaces and devices, in particular, IEC 958 digital audio interfaces and DAT recorders. *Id.* at 35-41, 43-47. These technical characteristics comprise exact bit sequences and other precise requirements designed for these specific interfaces and devices.

Section 1002 (a) (1) applies only to those devices that implement the technical characteristics of SCMS set forth in the TRD – IEC 958 interfaces and DAT recorders. Those devices already employed SCMS when the AHRA was enacted, and Congress made clear in Section 1002 (a) (1) that their specific system automatically satisfies the statutory requirement. *See also* H.R. Rep. 102-873, pt. 1, at 19 (1992):

> The Committee recognizes that SCMS has been subjected to extensive review by the affected industries and relevant international scientific standards bodies and that substantial investments have been made in products utilizing SCMS. For these reasons, SCMS automatically qualifies under the bill as satisfying the requirements of 1002 (a).

Diamond and CEMA take opposite positions with respect to Section 1002 (a) (1). Diamond argues that "Section 1002 (a) (1) cannot apply to *any* device" because the characteristics of SCMS are not defined in the AHRA itself, and complains that "[n]o evidence of the substance of the [SCMS] system was actually presented to the district court." Diamond Br. 37-39 (emphasis in original). But SCMS is defined in the AHRA's legislative history with precision through reference to the TRD.

CEMA, on the other hand, contends that SCMS is "clearly identified in the AHRA's legislative history and the meaning of the term is well

understood," but that SCMS requires conformance only to the *functional* characteristics in the TRD. CEMA Br. 11-14. However, as noted above, the AHRA House Report says precisely the opposite – that SCMS means both "the *functional and technical characteristics* as set forth in the [TRD]." If CEMA's analysis were correct, then Section 1002 (a) (2) – which specifically addresses systems complying with only the functional characteristics of SCMS – would be superfluous; the latter section would never be applied because any pertinent device would already be covered under Section 1002 (a) (1).

Because the Rio device is not a DAT recorder and does not in any way incorporate the specific bit sequences set out for DAT recorders or IEC 958 interfaces in the technical sections of the TRD, it does not comply with Section 1002 (a) (1).

B. Diamond Does Not Comply With Section 1002 (a) (2) Because the Rio Device Does Not Accurately Receive and Act Upon Copyright Information from Devices Using SCMS

Diamond does not comply with Section 1002 (a) (2) of the AHRA – whether or not the Rio product, with or without modified software, conforms

to the functional characteristics of SCMS[8] – because the Rio device does not properly receive and act upon information from SCMS-compliant devices.

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[8] While the matter is outside the record and accordingly not part of this appeal, we note that Diamond's asserted modification of its Rio software has not implemented the functional characteristics of SCMS; Diamond has instead contrived a scheme for circumventing the functional characteristics of SCMS. What Diamond apparently did was to modify its Rio Manager software to look at the copyright and original/copy status bits in MP3 files. (Such status bits do exist under the international standard in the headers of MP3 frames:

> **copyright** – If this bit equals '0', there is no copyright on the ISO/IEC 1172-3 bitstream, '1' means copyright protected.
>
> **original/copy** – This bit equals '0' if the bitstream is a copy, '1' if it is an original.

International Org. for Standardization/International Electrotechnical Comm'n, *Information technology – Coding of moving pictures and associated audio for digital storage media at up to about 1,5 Mbit/s*, Part 3: Audio §2.4.2.3, at 23 (ref. no. ISO/IEC 1172-3:1993 (E)) (1st ed. 1993).)

Diamond makes certain that the bits in the MP3 files to be copied into the Rio memory are *never* set correctly, however, because the MusicMatch software that it bundles as part of the Rio product strips the copyright and generation status information from audio tracks that it rips from copyrighted commercial CDs, and falsely sets the bits in the MP3 files that it creates as "not copyrighted" and "original." Accordingly, Diamond effectively uses one part of its software to circumvent the modifications supposedly made to another part of its software, with the result that the modified Rio product acts exactly as the original Rio product – it copies all MP3 files – as Diamond concedes. *See* Diamond Br. 40 n.7.

Diamond minimizes this second requirement of Section 1002 (a) (2), and CEMA fails even to acknowledge its existence. But this is a statutory requirement and it is critical in preserving the efficacy of the AHRA scheme for controlling unauthorized serial copying.

While Section 1002 permits manufacturers to develop new systems with the functional characteristics of SCMS, it requires that such systems accurately send and receive and act upon copyright and generation status information to and from devices using SCMS. 17 U.S.C. § 1002 (a) (2) (the system must "*require*[] that copyright and generation status information be accurately sent, received, and acted upon *between devices* using the system's method of serial copying regulation and devices using the [SCMS]" (emphasis supplied)). This requirement preserves the integrity of the AHRA, because it makes certain that the copyright information placed in audio CDs and other digital musical recordings by copyright owners to protect their intellectual property will be preserved all the way from the digital musical recording to the covered digital audio recording device.

Accordingly, while Section 1002 (a) (1) is intended to "automatically qualify" SCMS as a specific system that prohibits unauthorized serial copying in the devices described in the technical sections of the TRD,

Section 1002 (a) (2) is designed for newer products. In either case, however, the digital audio recording device is required to operate in a closed loop; a device cannot comply with Section 1002 (a) (2) unless it receives and acts upon copyright and generation status information from SCMS-compliant devices.

Without that requirement that compliant devices receive and act upon copyright and generation status information from SCMS-compliant devices, the AHRA would not provide any effective control over unauthorized serial copying. A device could conform to the functional characteristics of SCMS internally, but receive digital music over non-SCMS-compliant interfaces that do not carry copyright and generation status information.[9] Internal conformance to the functional characteristics of SCMS would then be useless, because the prohibitions on copying would not be triggered by copyright and generation status information when transmissions were

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[9] The AHRA regulates digital audio interface devices as well as digital audio recording devices, *see* 17 U.S.C. §§ 1001 (2), 1002 (a). Almost half of the TRD is a description of required characteristics of digital audio interface devices to ensure that they accurately transmit copyright and generation status information.

received. Such a device would not provide effective control against serial copying of the commercial CDs and other digital musical recordings that the AHRA was designed to protect. The Rio device, at best, is just such a device. It makes no effort to meet the second requirement of Section 1002 (a) (2).[10]

Diamond attempts to argue that because the Rio device cannot *ever* communicate with *any* SCMS-compliant device – but only with a computer – it does not need to receive and act upon SCMS information communicated by such devices. Diamond Br. 41. But the second part of Section 1002 (a) (2) is an affirmative requirement, as it must be for the AHRA copy

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[10] The elimination of effective control over serial copying appears to be the result desired by CEMA. CEMA contends that neither Section 1002 (a) (1) nor (a) (2) requires more than conformance to the functional characteristics of SCMS, CEMA Br. 11-18, and that the AHRA accordingly permits SCMS-compliant devices to make second and higher generation copies of copyrighted CD tracks with impunity, so long as a computer is employed during the serial copying process to strip out copyright information. This analysis would make AHRA Section 1002 (a) (3) irrelevant; certification by the Secretary of Commerce would never be necessary as almost anything would comply with Section 1002 (a) (1) and (a) (2). CEMA's argument for this modest evisceration of the AHRA consists of deleting from its discussion of the statute any reference to the technical characteristics of SCMS required by Section 1002 (a) (1), and the communication with SCMS-compliant devices required by Section 1002 (a) (2).

control system to work: A compliant system must "require[] that copyright and generation status information be accurately sent, received and acted upon." 17 U.S.C. § 1002 (a) (2). A digital audio recording device that receives digital transmissions, but does not receive such transmissions from an SCMS-compliant device over an SCMS-compliant interface, does not meet this affirmative requirement.

C. Diamond Does Not Comply With Section 1002 (a) (3) Because the Rio Device Does Not Conform to Any System Certified by the Secretary of Commerce

A manufacturer of devices that do not conform to SCMS, and do not both conform to the functional characteristics of SCMS and also send, receive, and act upon information from SCMS-compliant devices, can comply with the AHRA; it simply is not entitled to "automatic qualification." Such a manufacturer can comply by incorporating a system that has been "certified by the Secretary of Commerce as prohibiting unauthorized serial copying." 17 U.S.C. § 1002 (a) (3). This provision gives the AHRA the flexibility to deal with new technologies and new products that may not be able to communicate with SCMS-compliant devices. Section 1002 (a) (3) is the only part of Section 1002 (a) considered

by the district court to be applicable to the Rio device, yet Diamond's brief says little about it, so little reply is necessary.[11]

The Secretary of Commerce has not made any certification regarding the Rio device; indeed, Diamond has not even applied for certification.[12] Although the district court believed that the Secretary of Commerce would certify Diamond's "system" for the Rio device, no certification has even been sought. As demonstrated in our main brief, under those circumstances, Diamond is in continuing violation of the statute.

III. The Audio Home Recording Act Is Not Unconstitutional

A. The AHRA Does Not Unconstitutionally Regulate Expression

Contrary to Diamond's insinuations, the AHRA does not regulate the creation of musical works, the distribution of music (via the Internet or otherwise), music technology, or devices that only play music. What the

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[11] CEMA's proposed brief says nothing about Section 1002 (a) (3), which is one of the reasons that we question its helpfulness.

[12] Diamond attacks the Secretary of Commerce for having "established no procedure or regulations for certifications required under Section 1002 (a) (3)." Diamond Br. 42. But as the district court noted, Section 1002 does not require the Secretary to create any such procedure or regulations. ER 106.

AHRA does is to require that a specific class of devices – designed or marketed for the primary purpose of, and capable of, making digital audio copied recordings for private use – restrict unauthorized serial copying in one of three ways. Diamond argues that this narrow requirement operates as a ban on new technology, but as demonstrated above, the serial copy provisions of the AHRA provide a flexible framework for the introduction of new digital audio recording devices.

The cases cited by Diamond provide no support for its contention that the AHRA violates the First Amendment. Those cases all deal with *restrictions on expression* taking place on public property. *See, e.g., Ward* v. *Rock Against Racism*, 491 U.S. 781 (1989) (upholding use guidelines for park band shell); *S.O.C., Inc.* v. *County of Clark*, 152 F.3d 1136 (9th Cir. 1998) (ordinance restricting canvassing on public sidewalks would violate the First Amendment); *Foti* v. *City of Menlo Park*, 146 F.3d 629 (9th Cir. 1998) (elements of ordinance banning the posting of signs on public property would violate the First Amendment); *Perry* v. *Los Angeles Police Dep't*, 121 F.3d 1365 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1362 (1998) (statute prohibiting sales and solicitation of donations along sidewalks violates the First Amendment).

This Court has made clear that such "forum analysis" is used to evaluate "the scope of the government's power to restrict First Amendment activity *on public property*." *Hale* v. *Dep't of Energy*, 806 F.2d 910, 915 (9th Cir. 1986) (emphasis supplied); *see also Children of the Rosary* v. *City of Phoenix*, 154 F.3d 972, 976 (9th Cir. 1998) ("Forum analysis divides *government property* into three categories . . .") (emphasis supplied). But the AHRA does not regulate expression on public property. Indeed, it does not regulate expression at all. It merely requires that a narrow class of devices limit serial copying of copyrighted material.

Statutes that regulate communication services or technology are regularly upheld against First Amendment challenges. *See, e.g., SBC Communications, Inc.* v. *FCC,* 154 F.3d 226, 247 (5th Cir. 1998) (upholding Section 274 of the Telecommunications Act of 1996 which restricts Bell Operating Companies from providing electronic publishing services); *BellSouth Corp.* v. *FCC*, 144 F.3d 58, 70 (D.C. Cir. 1998) (same); *Bland* v. *Fessler*, 88 F.3d 729, 732-36 (9th Cir. 1996) (upholding California utilities statute that regulates automatic dialing and announcing devices); *Johnson* v. *City of Pleasanton*, 982 F.2d 350, 352-53 (9th Cir. 1992) (upholding city ordinance setting height, screening, and setback requirements for satellite

antennas); *Howard* v. *City of Burlingame*, 937 F.2d 1376, 1381 (9th Cir. 1991) (upholding city ordinance requiring a permit for ham radio antennas over 25 feet in height).

Diamond's suggestion that the AHRA violates the First Amendment is belied by these cases. For example, the provision of the Telecommunications Act of 1996 challenged by the Bell Operating Companies ("BOCs") banned BOCs and their affiliates from providing electronic publishing services for four years, unless such services were provided by a separate affiliate or an electronic publishing joint venture. *See* 47 U.S.C. § 274 (a), (h). Despite the breadth of this ban, two United States Courts of Appeals found that it does not violate the First Amendment because it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests. *SBC Communications, Inc.*, 154 F.3d at 247; *BellSouth Corp.*, 144 F.3d at 70.

The AHRA does not prohibit any speech whatsoever. And Congress enacted the AHRA to advance important governmental interests. The AHRA was "designed to respond to the threat that the perfect copying capability of the digital audio recorder presents to those engaged in creating

and introducing music into commerce in the United States" and to "lead the way toward improving competitiveness while providing consumers with access to exciting technology." H.R. Rep. No. 102-780, pt. 1, at 19 (1992). As the *BellSouth Corp.* court stated, "we owe Congress's economic judgments considerable deference, so as not to 'infringe on traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy.'" 144 F.3d at 70 (citing *Turner Broadcasting System, Inc.* v. *FCC*, 520 U.S. 180 (1997)).

Nor is the AHRA substantially more burdensome than necessary to promote its goals. Diamond contends that the AHRA is not narrowly tailored because requiring the Rio device to comply with this statute "would deprive musicians and small record companies of the ability to publish musical recordings on the Internet." Diamond Br. 49. But musical recordings have been published on the Internet since long before Diamond introduced its Rio device, because nothing in the AHRA affects the publication of musical recordings. Diamond's suggestion that the AHRA does not leave open alternative channels of communication is unsupported and contrary to the record. Musicians and distributors of music remain free to disseminate their music through any legal channels, including the Internet.

Moreover, manufacturers are free to design and market any device for playing music – except digital audio recording devices that do not control serial copying. The AHRA imposes minimal and flexible requirements only on manufacturers of devices that make digital audio copied recordings to protect copyright owners from serial copying. This sort of regulation raises no First Amendment issue.

B. The AHRA Is Not Unconstitutionally Vague

Diamond makes a separate constitutional attack on Section 1002 (a) of the AHRA as vague because the definition of "Serial Copy Management System" does not appear in the text of the AHRA. However, as Diamond recognizes, a statute need only give a person of ordinary intelligence adequate notice of the conduct it proscribes. *Conlan* v. *United States Dep't of Labor*, 76 F.3d 271, 276 (9th Cir.) (citing *United States* v. *594,464 Pounds of Salmon*, 871 F.2d 824, 829 (9th Cir. 1989)), *cert. denied*, 519 U.S. 980 (1996). Moreover, "[a] statute providing for civil penalties is 'reviewed with somewhat "greater tolerance" than one involving criminal penalties.'" *Id.*

Diamond cites the section of the Report by the House Committee on the Judiciary which states why the definition of SCMS was removed from

the text of the legislation. But that same section of the House Report explains that "[t]he Committee intends the term 'Serial Copy Management System' to be construed as meaning only the functional and technical characteristics as set forth in the Technical Reference Document, as reproduced in the report of the Energy and Commerce Committee, H.R. Rep. No. 102-780, Pt. I, 102d Cong., 2d Sess. 32-50 (1002)." H.R. Rep. 102-873, pt. 1, at 14 (1992). This Report not only provides a clear statement by Congress as to what SCMS means, but also details exactly where to find the document that sets forth the characteristics of SCMS in great detail.[13] It is incomprehensible how the AHRA "exposes a potential actor to some risk or detriment without giving him fair warning of the nature of the proscribed conduct." *Rowan* v. *United States Post Office Dep't*, 397 U.S. 728, 740 (1970).[14]

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[13] Diamond's "void for vagueness" argument is opposed by CEMA. *See* CEMA Brief at 11 & n.4 ("While SCMS is not expressly defined in the final text of the AHRA, it is clearly identified in the AHRA's legislative history and the meaning of the term is well understood.").

[14] In somewhat archaeological reliance upon the *Trade-Mark Cases*, 100 U.S. (10 Otto) 82 (1879), Diamond argues also that Congress exceeded its constitutional authority in enacting the AHRA and thereby regulating a small class of electronic devices that engage in unauthorized serial copying.

[Footnote is continued on following page]

IV. The District Court's Balancing of Threatened Injuries Was Legally Impermissible

Diamond's discussion of irreparable injury, a matter discussed at some length in our main brief, requires little response. Diamond states that "Plaintiffs depend heavily upon an argument that the district court lacked discretion to refuse an injunction if a violation of the AHRA is shown, even if that violation was merely technical or *de minimis*." Diamond Br. 55. We made no such argument. As explained at pages 27-37 of our main brief, the district court's error was in finding that plaintiffs' *probability of success on*

[Footnote continued from previous page]

See Diamond Br. 50-54. However, "[t]he scope and content of the Commerce Clause has expanded tremendously since the *Trademark Cases*. . . . Trademarks, along with many other vehicles of commerce are now subjected to federal control and regulation." 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 1.09, at 1-66.39 (1997); *see also, e.g.*, *Wickard* v. *Filburn*, 317 U.S. 111 (1942) (broad scope of Commerce Clause); *New Kids on the Block* v. *News America Publ'g, Inc.*, 971 F.2d 302, 305 (9th Cir. 1992):

> Although an initial attempt at federal regulation was declared unconstitutional, see the *Trade-Mark Cases*, 100 U.S. 82 (1879), trademarks have been covered by a comprehensive federal statutory scheme since the passage of the Lanham Act in 1946.

the merits was only "*mixed*" when plaintiffs had established a continuing violation of the AHRA.

Once it concluded that Diamond was violating the AHRA, the district court should have realized that Diamond's failure to receive profits from sales of an illegal product – or, for that matter, failure to gain "reputation for innovation," "goodwill from consumer awareness," and "spillover effect" Diamond Br. 63 – counts for nothing. Diamond has no right to benefit in *any* way from sales of an illegal product. Neither does the public have any cognizable interest in being able to buy an illegal product.

The district court's injury analysis was predicated on its conclusion that Diamond's violation of the AHRA was "technical" because, in the district court's view, the Secretary of Commerce would certify the Rio device under AHRA Section 1002 (a) (3). As Diamond has since made clear that it has no intention of seeking Section 1002 (a) (3) certification, this analysis does Diamond little good, and Diamond accordingly attempts to characterize the district court's conclusion as a finding of *de minimis* violation. But that is not what the district court found. The district court found that the Rio device operated through serial copying, ER 104 – not on rare occasion, but every time it is used – and that "the Rio will inevitably be

used to record . . . illegitimate music," ER 107. Diamond's violation of the statute is de maximis.

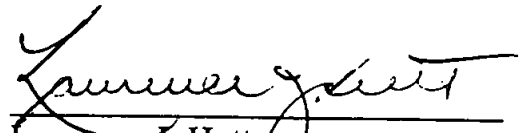
The district court failed to consider the extensive evidence of irreparable harm presented by every sector of the recording industry. *See* Appellants Br. 41-47. As demonstrated in our main brief, had the district court properly balanced the equities in this case, a preliminary injunction would have issued.

CONCLUSION

The parties appear to agree that the district court's analysis was erroneous, and that this Court should correct the errors on appeal. As demonstrated in plaintiffs' main brief on appeal, the district court committed error in concluding that plaintiffs' likelihood of success on the merits was "mixed." Plaintiffs established that Diamond's manufacture, importation, and distribution of the Rio digital audio recording device violate the Audio Home Recording Act. The district court abused its discretion in determining that the balance of equities tipped in favor of Diamond, which failed to demonstrate any threat of legally cognizable injury, and against the plaintiffs, who demonstrated a serious threat of irreparable injury.

For the reasons set forth above and in plaintiffs' main brief on appeal, the district court's denial of plaintiffs' motion for preliminary injunctive relief should be reversed.

Respectfully submitted,



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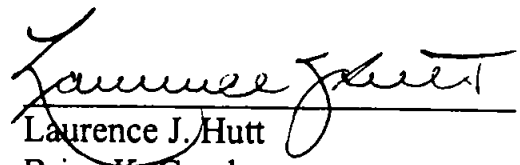
Dated: January 8, 1999

CERTIFICATION PURSUANT TO CIRCUIT RULE 32(e)(3)

Pursuant to Ninth Circuit Rule 32(e)(3), I certify that the reply brief is proportionately spaced, has a typeface of 14 points or more and contains 6855 words.

Respectfully submitted,



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PROOF OF SERVICE

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County of Los Angeles)

Short Title: Recording Industry Association of America, inc. and Alliance of Artists and Recording Companies v. Diamond Multimedia Systems, Inc.
Case No.: 98-56727

I hereby certify that a true and correct copy of the foregoing REPLY BRIEF FOR PLAINTIFFS-APPELLANTS RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC. and ALLIANCE OF ARTISTS AND RECORDING COMPANIES was served by Federal Express overnight mail (Saturday delivery) on January 8, 1999 upon each of the following:

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